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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 156

CLAYTON S. KRAMER, *Petitioner,*

v.

CARIBBEAN MILLS, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 1494

CLAYTON S. KRAMER,

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v.

CARIBBEAN MILLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 392 F. 2d 387. No written opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The date of the judgment and opinion sought to be reviewed by Clayton S. Kramer is January 26, 1968, and the time of their entry was January 26, 1968. A Motion for Rehearing En Banc was thereafter filed and was denied on March 5, 1968. Petitioner seeks to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

The question presented is whether a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which held that under Title 28, United States Code, Section 1359, an assignee who is obligated to pay his assignor 95% of that which might be obtained, cannot properly invoke federal jurisdiction with regard to a dispute between two alien corporations who would not otherwise have access to federal court, when the assignment did not divest the assignor of its interest in the lawsuit, the assignee was not involved in and is not knowledgeable about the events leading up to the lawsuit, has no interest in the lawsuit aside from his fee and is nothing but a collection agent.

STATUTE INVOLVED

United States Code, Title 28:

§1359. Parties collusively joined or made.

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise,

has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

The Petitioner is correct when he states that a dispute arose between two alien corporations concerning a written agreement between Caribbean Mills, Inc., on the one hand, and Roy Kelly of Washington, D. C., and Panama and Venezuela Finance Company on the other hand. Caribbean Mills, Inc., is incorporated under the laws of the Republic of Haiti where it operates a flour mill near Port-au-Prince, Haiti (R. 99), and Panama and Venezuela Finance Company is incorporated under the laws of Panama. It is also correct that for reasons that are disputed, but which are not relevant to this Petition, Caribbean Mills, Inc., did not make any installment payments under the May 30, 1959, Agreement, which had a closing date of June 4, 1959. (hereinafter referred to as the "May 30, 1959 Agreement") The only facts which are relevant on the question of whether a Writ of Certiorari should issue are those facts which relate to whether or not the United States Court of Appeals for the Fifth Circuit was correct in holding that the trial court did not have jurisdiction because the Petitioner had been improperly or collusively made the Plaintiff to invoke the jurisdiction of the court.

The Petitioner, Clayton S. Kramer, is a Wichita Falls, Texas, attorney who learned of the May 30, 1959, Agreement, upon which the suit was based, in the summer of 1964 from Jack Banner, the attorney who represented him in the trial court (R. 60). Mr. Banner was briefing a legal point involving a cause of action and told Mr. Kramer that

there might be a claim which could be acquired on which he could make some money. Mr. Kramer knew that no payment had been made with respect to installment payments under the May 30, 1959, Agreement (R. 66), and knew that there was a possibility that suit would have to be filed (R. 81-82). Mr. Kramer has had no direct contact with Panama and Venezuela Finance Company (R. 90) and did not participate in, nor does he have any actual knowledge of, the transactions relating to the execution of the May 30, 1959, Agreement (R. 96), other than that information which was given to him by the attorney who represented him and arranged for him to obtain the "Assignment" (R. 69). The Petitioner has had no personal contact with, nor does he know any party to, the May 30, 1959, Agreement (R. 93-94). Mr. Kramer instituted this action against the Respondent, Caribbean Mills, Inc., on the basis of an "Assignment" to him from Panama and Venezuela Finance Company. Mr. Kramer was not able to identify the signature of any representative of Panama and Venezuela Company or testify that the "Assignment" had been executed. When suit was filed, Petitioner made reference to the "Assignment" from Panama and Venezuela Finance Company, which appears to be a complete assignment on its face, but did not disclose the existence of his obligation to return 95% of any amount which he might recover. During deposition the Petitioner refused to answer any questions relating to the consideration which he had paid for this cause of action or the terms of any other agreement which he had with Panama and Venezuela Finance Company. By filing a motion with the

Court to compel the Petitioner to answer questions concerning this transaction and resuming the deposition after the motion was sustained, it was learned that Petitioner, on the same day as the "Assignment", had executed and delivered an "Agreement" to Panama and Venezuela Finance Company which obligated him to pay the 95% of any amount that he received to Panama and Venezuela Finance Company. The Fifth Circuit found that the only consideration which Petitioner paid for the "Assignment" from Panama and Venezuela Finance Company was $1.00.

ARGUMENT

A Petition for Writ of Certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The Court held in an opinion by Judge Thornberry that there was no jurisdiction over the subject matter in this action because the Petitioner was made a party in contravention of the provisions of Title 28, United States Code, Section 1359. Under the facts in this case, the decision of the Fifth Circuit in this action is correct, does not conflict with prior decisions of the Supreme Court of the United States, is not in direct conflict with the decisions of other United States Courts of Appeal, and does not present an important question for review by this Court in that the decision turns upon the facts in this particular action. It was the conclusion of the Court of Appeals that:

> "By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in any

other way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the lawsuit".

In support of the above conclusion the Court then discussed the legislative history of Section 1359 and certain of the cases which have been decided under this section and preceding provisions, but in this discussion the Court again placed emphasis upon the fact that:

> "In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee."

The decision of the United States Court of Appeals for the Fifth Circuit recognized that by virtue of Section 1359, where diversity jurisdiction does not exist, a colorable or fictious assignment of a cause of action which does not divest the assignor of ownership, does not create federal jurisdiction.

I.

THE DECISION IS CORRECT

The decision of the Court of Appeals is patently correct; indeed, a clearer case coming within the proscription of Section 1359 would be difficult to imagine. The Fifth Circuit discussed the legislative history of Title 28, United States Code, Section 1359, and gave the

reasons for the previous changes which have been made.[1] As the Court pointed out, "The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy." The Court correctly held that with regard to colorable or fictitious transfers which do not divest the assignor of ownership the law was not changed by the revision of the 1948 Judicial Code.[2] After considering certain pre-revision cases decided under the previous statutory provisions, the Fifth Circuit stated that the device employed by Panama and Venezuela Finance Company in this action would not have been proper under

[1] The possibility of manufacturing diversity jurisdiction by assignment has been the subject of concern since the Judiciary Act of 1789 which denied jurisdiction to an assignee if it was unavailable to his assignor. Title 28, United States Code, Section 41(1) (1940) provided that the citizenship of both the assignor and assignee had to be diverse from that of the defendant in an action brought by an assignee, and Title 28, United States Code, Section 80 (1940), directed the dismissal when the parties had been improperly or collusively made or joined, for the purpose of creating jurisdiction. The "assignee clause" set forth in Title 28, United States Code, Section 41(1) (1940) was repealed, and Title 28, United States Code, Section 80 was modified to include assignments by the Judicial Code and Judiciary Revision Act of 1948, which resulted in the enactment of Title 28, United States Code, Section 1359 in its present form.

[2] The following comment appears in 3A Moore's Federal Practice, ¶17.06, at page 205: "The assignee clause was omitted from the Judicial Code and Judiciary Revision Act of 1948 due to the

(Continued on following page)

the statutes prior to revision. *Williams v. Nottawa*, 1881, 104 U. S. 209, 26 L. Ed. 719; *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444; *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U. S. 293, 29 S. Ct. 111, 53 L. Ed. 189; *Southern Realty Investment Co. v. Walker*, 1909, 211 U. S. 603, 29 S. Ct. 211, 53 L. Ed. 346; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681; and *Central Paper Co. v. Southwick*, 56 F. 2d 593 (C.C.A. 6, 1932).

The following language of this Court in *Lehigh Mining & Mfg. Co.*, supra, is applicable to and is authority for the decision in the present case:

> "* * * It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania corporation. It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record (Grace v. American Cent. Ins. Co. 109, U. S.

(Continued from preceding page)
difficulty that had been encountered in construing it; because an assignee, holding under a bona fide assignment made without any intent to create federal jurisdiction, should in all cases be able to resort to the federal courts without regard to the citizenship of his assignor; and because any assignment made to create federal jurisdiction was properly prohibited by former §80; it now states expressly that an assignment cannot be used to create jurisdiction; and it is the only provision in the Revision Act which deals with assignment as a limitation upon jurisdiction. The old assignee clause was accordingly repealed."

278, 283 [27: 932, 934]; Bors v. Preston, 111 U. S. 252, 255 [28: 419, 420]); * * *"

"* * * Its scope and effect were determined in Williams v. Nottawa, 104 U. S. 209, 211 [26: 719, 720], and Morris v. Gilmer, 129 U. S. 315 [32: 690]. In the first of those cases the court, referring to the act of 1875, said: 'In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction.'"

"* * * If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The similarity of the facts in *Central Paper Co.*, supra, with the facts in the present case as they relate to an assignment made for the purpose of creating fictitious jurisdiction, makes the following language in that Opinion pertinent:

"Even before the enactment of the above act, a plaintiff holding the technical legal title, only, under a pretended or simulated assignment, conveyance, or transfer, could not maintain an action in the federal courts, Barney v. Baltimore City, 6 Wall. 280, 288, 18 L. Ed. 825 (1867), and it has been emphasized

since the passage of that act that such colorable assignments, conveyances, and transfers are a fraud upon the courts, and that they will not entertain jurisdiction as to them. Coming within this category are assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in the federal courts for the purpose of collecting the same. This is settled by many authorities. Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719; Bernards Township v. Stebbins, 109 U. S. 341, 353, 3 S. Ct. 252, 27 L. Ed. 956; Farmington v. Pillsbury, 114 U. S. 138, 5 S. Ct. 807, 29 L. Ed. 114; Lake County Commissioners v. Dudley, 173 U. S. 243, 250, 19 S. Ct. 398, 43 L. Ed. 684; Waite v. Santa Cruz, 184 U. S. 302, 324, 22 S. Ct. 327, 46 L. Ed. 552; and Woodside v. Beckham, 216 U. S. 117, 30 S. Ct. 367, 54 L. Ed. 408.

"* * * Concerning the claim of Johnson & Carlson it appears that Southwick paid no money (except $1) for the assignment, and that he was to pay more only if he collected the money. As to the claim of Isaacson, the latter's own testimony was that he turned the claim over to Southwick for collection, and that he was to be paid if Southwick was able to collect it. As to Lamppa, the latter's testimony was that Southwick promised to pay him in full for his wood when he collected it; that perhaps he was to deduct something for his services for making the collection; but nothing had been said as to the exact amount of the fees. As to the claim of Sillanpaa, it appears that Southwick paid the sum of $1 for the technical assignment of the legal title; that it was turned over to him so that the assignor could get something out of the case; and that Sillanpaa would get the rest of the money if Southwick was able to collect it.

"This, in summary, is the testimony of the assignors, and the testimony of Southwick is not to the contrary. The effect of his testimony is that he was the holder of the technical legal title to these claims."

> "We are satisfied that, within the principle of the above decisions, these four assignments to him were colorable only, and that he held the bare legal title, for which he had paid the sum of $1, and that the assignments were made to him for the purpose of creating a case of fictitious jurisdiction, in contravention of the statute. In our opinion the trial court erred in not dismissing these claims without prejudice for want of jurisdiction as to them."

It is clear that the decision of the court below is correct.

II.

THERE IS NO CONFLICT

The Petitioner argues that a Writ of Certiorari should be granted by virtue of the contention that the decision below conflicts with the decisions of other Courts of Appeals, referring to *Bradbury v. Dennis*, 310 F. 2d 73 (C.C.A. 10, 1962), *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (C.C.A. 3, 1959), *McCoy v. Blakely*, 217 F. 2d 227 (C.C.A. 8, 1954), *County of Todd, Minn. v. Loegering*, 297 F. 2d 470 (C.C.A. 8, 1961), and *City of Eufaula, Alabama v. Pappas*, 213 F. Supp. 749 (M.D. Ala., 1963). A careful reading of these cases in the light of the facts in the instant case shows clearly that there is no real conflict present. Although the court found *Bradbury v. Dennis*, supra, difficult to reconcile with pre-revision cases such as *Lehigh Mining & Mfg. Co. v. Kelly*, supra, the fifth circuit stated as to the *Bradbury* case, that "Since the transfer was supported by adequate consideration and since there was nothing 'surreptitious or fictitious' about it, the court felt that the proscription of Section 1359 was inapplicable." The

presence of a surreptitious or fictitious transfer in the present case clearly distinguishes the present case from *Bradbury*. *Corabi v. Auto Racing, Inc.*, supra, is the primary case upon which Petitioner relies to establish the existence of a conflict. The *Corabi* case dealt with the appointment of an out of state administrator by a state court and a subsequent wrongful death action by that administrator in federal court. The Tenth Circuit defined the words "improper and collusive", in determining that this appointment was not within the prohibition of the statute, in a manner which was not acceptable to the Fifth Circuit, but as to *Corabi* the Fifth Circuit noted that:

> "The result is supported by the rule that the decree of a state probate court naming an administrator could not be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling that appointment as improper or collusive within the meaning of Section 1359".

Like *Corabi*, *McCoy v. Blakely*, supra, and *County of Todd, Minn. v. Loegering*, supra, both involved the appointment of an out of state administrator or trustee and subsequent wrongful death action, and are clearly distinguishable from the present case for the above reasons. It is interesting to note that in the *McCoy* case the Court made reference to the fact that "The appointment and qualification of the plaintiff was real and bona fide. It was not merely colorable

or feigned," and also stated that "The record shows no collusion or impropriety in the appointment of Blakely." In *County of Todd, Minn.*, the Court stated "The evidence as a whole, on this point and as a matter of law, motive being deleted, permits no inference of sham, pretense or fiction or any other factors which enter into collusive or improper joinder to effect federal jurisdiction."

The only opinion discussed by the Fifth Circuit which is clearly contrary to and indistinguishable from the present case is the District Court case of *City of Eufaula, Alabama v. Pappas*, 213 F. Supp. 749 (M.D. Alabama, 1963), which the Fifth Circuit chose not to follow by stating with regard to this case that "In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction."

III.

THE DECISION TURNS UPON FACTS IN THIS ACTION

Petitioner states that the decision below raises significant problems concerning efforts to invoke and create federal diversity jurisdiction, and argues that a Writ of Certiorari should issue so that this Court can provide the solution to certain "unanswered questions". The argument that the decision in this action creates significant problems is based upon his assumption that "the Fifth Circuit here could find no 'collusion' or 'impropriety' in the *Corabi* sense, for there

was no secret collusion between the petitioner and the respondent, nor was there any legal impropriety in the assignment to the petitioner of the Panama and Venezuela Company claims", his further assumption that "Moreover, such a legal assignment for the purpose of collection made the petitioner the real party in interest under Rule 17(a), F.R.C.P., for the purpose of prosecuting this Action. 3A Moore's Federal Practice, Sec. 17.09, p. 271 (1967)," and the contention that the opinion below creates a conflict between the Circuits with regard to the meaning of the words "collusive" and "improper", the relevancy of "motive", and "the historic policy of limiting diversity jurisdiction". It is respectfully submitted that these assumptions and contentions are not valid.

Although any question which relates to the jurisdiction of a federal court is of importance since the federal courts are courts of limited jurisdiction, the question presented in this action is not an important question for this Court in that the decision of the United States Court of Appeals is based upon facts which established that the Petitioner was named Plaintiff by virtue of a colorable or fictitious assignment. The question of whether or not there is a conflict has already been discussed, but it should be again noted that in *Corabi*, the Court was dealing with the actual and bona fide appointment by a state court of a representative for an estate, where there was no sham, pretense, or fraud practiced upon the court, and where to have held otherwise would have sanctioned a collateral attack upon that appointment; and that in *Black and White Taxicab & Transfer Co.*, as the Petitioner recognized, the

Court found that the transfer was actual, not feigned, and that the respondent was the real party in interest. With regard to the question of whether or not there was secret collusion in the present case, it should be noted that the "Assignment" from Panama and Venezuela Finance Company to Clayton S. Kramer appeared on its face to be a complete assignment to Kramer of Panama and Venezuela Finance Company's entire cause of action. Respondent did not learn of the existence of any other agreement between Mr. Kramer and Panama and Venezuela Finance Company until Kramer's deposition was taken and it was learned that there was an additional agreement. Clayton S. Kramer would not answer questions in the deposition with regard to the terms of this additional agreement, and it was necessary for Petitioner to file a motion with the trial court to compel the disclosure of the terms of this agreement, and to require him to produce the agreement. After the trial court granted this motion, it was then learned for the first time that Kramer was obligated under the terms of an "Agreement" to pay 95% of any amount which he collected, after payment of attorney's fees, to Panama and Venezuela Finance Company. It can hardly be said that this collateral agreement to pay 95% of the total amount collected was not secret when Respondent was forced to obtain an Order from the trial court directing Petitioner to answer questions in this regard, and when the "Assignment", upon which suit had been brought, appeared on its face to be a complete transfer of the entire cause of action and did not contain any reference to the "Agreement." The con-

clusion of the Petitioner that the "Assignment" made him the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure is not correct. 3A Moore's Federal Practice, ¶17.09, which was cited by Petitioner as support for this statement, begins with the following language:

> "At the outset it must be remembered that Rule 17(a) does not enlarge or restrict federal jurisdiction. Assignments cannot be used 'improperly or collusively' for the purpose of founding jurisdiction in a federal court. The principles hereinafter elaborated concerning an assignee as a real party in interest in federal court can be applied only in cases where there is proper jurisdiction."

Petitioner closes his Petition for a Writ of Certiorari with a reference to a Study of the Division of Jurisdiction between State and Federal Courts, conducted by the American Law Institute. This study by the American Law Institute and the district court opinion in *City of Eufaula*, which is the only case where there is a real conflict, are also discussed in 3A Moore's Federal Practice ¶17.05 [3.-3]. This section in Moore's considers from a jurisdictional standpoint both the appointment of a representative for an estate who has diverse jurisdiction and thus access to federal courts, and the transfer or assignment of a cause of action to create diversity jurisdiction. The reference by the ALI to the situation in the federal courts of Philadelphia appears to relate to the appointment of representatives who can invoke the jurisdiction of federal courts, not to the assignment of a cause of action to create diversity jurisdiction. These are related but distinct problems insofar as they concern the jurisdiction of a federal court in that

the appointment of a representative for an estate by a state court, and subsequent question of the jurisdiction of the court in an action by this representative on behalf of the estate in federal court requires the consideration of factors which are not present in determining the validity of a colorable or fictitious assignment of a cause of action to create diversity jurisdiction. In considering the assignment of a cause of action to create jurisdiction this aforementioned section of Moore's Federal Practice states that "In the decided cases involving transfers to create diversity, it does not appear that the results have been outrageous. However, there has also been criticism here, and the ALI refers to one 'particularly egregious example'." (referring to *City of Eufaula v. Pappas*, supra). This section of Moore's Federal Practice, which is an appraisal of Section 1359, then concludes that "We believe, however, that the federal courts should not await legislative action; that the judicial process is curative as well as creative; and that the federal courts should enunciate federal principles that would not permit either the deliberate manufacture or avoidance of federal jurisdiction." In that under the facts in this action, the opinion of the United States Court of Appeals for the Fifth Circuit does not conflict with the decisions of other Courts of Appeal and correctly sets forth principles previously established by this Court, there is no reason why the Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for Respondent Caribbean Mills, Inc., does certify that service of the above and foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari, was this day accomplished pursuant to Rule 33(1) of the Rules of this Court by depositing 4 copies of same in a United States Post Office mail box, with air mail postage prepaid, by certified mail with return receipt requested, addressed to Jack Banner and Eugene Gressman, counsel of record herein for Petitioner Clayton S. Kramer, at their post office address of record herein.

July 1, 1965

Morris Harrell

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Counsel for Respondent.